SUPREME COURT, U. S.

DEC 27 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 879

LEO HENZEL, *Petitioner,*

v.

STATE OF FLORIDA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

ROBERT M. HERZSTEIN
DANIEL A. REZNECK
ARNOLD & PORTER
1229 19th Street, N. W.
Washington, D. C. 20036
Attorneys for Petitioner

Of Counsel:

FINK & SYNA
M-113 Biscayne Building
19 West Flagler Street
Miami, Florida 33130

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Petitioner prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of Florida, Third District, affirming his conviction for grand larceny.

OPINIONS BELOW

The opinion of the District Court of Appeal is reported at 212 So.2d 92 (1968). It is set forth in Appendix A to this petition.

JURISDICTION

The opinion of the District Court of Appeal was filed June 18, 1968. The District Court of Appeal denied a petition for rehearing on July 24, 1968. The

Supreme Court of Florida denied a petition for a writ of certiorari on September 24, 1968. The Supreme Court of Florida denied a petition for rehearing on October 31, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) The Sixth and Fourteenth Amendments to the United States Constitution;

(2) Florida Statutes Annotated §§ 811.021 and 914.01.

These provisions are set forth in Appendix B to this petition.

QUESTION PRESENTED

Does the Fourteenth Amendment guarantee to a criminal defendant in a felony case in a state court the right to be present at his own trial unless he knowingly and intentionally waives the right?

STATEMENT OF THE CASE

Petitioner was convicted in a non-jury trial in the Criminal Court for Dade County, Florida, of the crime of grand larceny, in violation of Fla. Stat. Ann. § 811.021. He was sentenced to five years confinement at hard labor in the state penitentiary. (Tr. 633-34).[1]

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[1] References to the transcript of the record in the court below are cited herein as "Tr. —." References to the supplemental transcript of the record on appeal are cited as "Supp. Tr. —."

This conviction was based on a charge that on September 3, 1963 petitioner obtained $5500 by false pretenses from Otto Cipra. (Tr. 619-20) At the same time, the court found petitioner not guilty of four other charges of defrauding Cipra, which had been consolidated for trial with the case in which he was convicted.[2] (Tr. 611, 630)

The theory of the prosecution's case, insofar as it was ever articulated, was that Cipra gave a number of checks to petitioner on the basis of petitioner's allegedly false representations that he was the sole owner of a corporation and product called "Ad-Tile" and that Cipra would receive a 50 per cent stock interest in the venture in return for his money. It was alleged that petitioner had also concealed from Cipra that he was making similar representations and similar promises of a half-interest in "Ad-Tile" to other persons at the same time. As the prosecutor summed up the gravamen of the charges:

> "we have a pattern here . . . as far as each one of these men was concerned, he [petitioner] was retaining 50% for himself, and he is selling more than 100% of the corporation and obtaining money and services from all of them at the same time, keeping their existence secret from the others, and at the same time representing to all of them that this product . . . was exclusively his." (Tr. 319-20).

Trial of the case commenced July 6, 1966. The prosecution's case-in-chief lasted two days. On the first

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[2] Two other charges against petitioner of defrauding Cipra were dismissed by the court for lack of prosecution after sentencing. (Tr. 617).

day, Cipra, a Miami insurance man, testified that he met petitioner in 1962. Petitioner was promoting "Ad-Tile", which Cipra described as a vinyl tile displaying an advertisement and designed to be placed on the floor of a grocery or supermarket. (Tr. 5-8.) According to Cipra, petitioner said that he was the owner and creator of "Ad-Tile." Cipra gave petitioner a series of checks during 1963 and said he believed that he was to have a stock holding of 50 per cent in various enterprises being promoted by petitioner, including "Ad-Tile." He said that he repeatedly demanded his stock from petitioner, but received neither stock nor an accounting for his money. He said that he learned in the fall of 1963 that petitioner supposedly had also promised other persons 50 per cent of "Ad-Tile." (Tr. 9-20, 22-23, 28-30, 41-47, 49-52, 54-57, 63-64, 133.)

Cipra admitted that on all the checks—except that of September 3, 1963, the only charge on which petitioner was ultimately convicted—he received back from petitioner promissory notes payable on demand and bearing 6 per cent interest. But he denied that the checks were actually loans to petitioner, claiming that the notes were security for the issuance of the stock. (Tr. 58-59, 63-64, 107.)

The prosecution then sought to buttress Cipra's testimony by that of another Miami entrepreneur, John Gibson. Gibson said that a man named Albert Whidden introduced petitioner to him in 1962 with a view to interesting him in "Ad-Tile." (Tr. 143.) Gibson testified that petitioner sent him a letter certifying ownership of "Ad-Tile" and promised that if Gibson helped merchandise the product, they would share equally in its ownership. (Tr. 144-49). Gibson said

that he was unaware until the fall of 1963 that Cipra also claimed an interest in petitioner's enterprises. He asserted that he also then learned that a New York corporation called Point of Impact, Inc., actually owned "Ad-Tile". (Tr. 166-68).

The second trial session began five days later, July 11, 1966. Petitioner was absent. At the outset of the day's proceedings, this colloquy took place:

> "THE COURT: Where is Leo Henzel?
>
> MR. STEPHENS [Petitioner's trial attorney]: If the Court please, he is stranded in New York by the strike.[3]
>
> THE COURT: All right, where is Mr. Terry [the prosecutor]? I saw him just a minute ago.
>
> MR. STEPHENS: Your Honor, I have indicated to Mr. Terry, in order to expedite matters, with the Court's permission—
>
> THE COURT: I want Mr. Terry here.
>
> MR. STEPHENS: Here he is now.
>
> THE COURT: All right, what were you saying?
>
> MR. STEPHENS: I have discussed this matter of the defendant's absence with Mr. Terry and, with the Court's permission and with the State's permission, I would respectfully waive his presence at this stage of the proceedings in order to complete the testimony of the witnesses now in attendance on the Court.
>
> THE COURT: All right, but before we do this, let us make sure that when he comes back, for the record, that he affirms that because we ran into that problem on the Joe Cole matter, where his lawyer waived it, and he tried to say that he

[3] An airline strike was then in progress.

did not authorize his lawyer to do that. So all I am saying is that I want you to remember that when he gets back that you are to get him to reaffirm that.

MR. TERRY: In other words, I don't know whether you can make such a waiver, but I wanted the Court's sanction on it. I think the Court has stated its position on the matter.

MR. STEPHENS: One other request, your Honor. The witness, Sambartaro—unfortunately, I don't have the documents that I would need in cross examination of this particular witness. I will go as far as I can, with the Court's permission, and complete it at the next session." (Tr. 258-59).

The prosecution thereupon called two key witnesses, Albert Whidden and Joseph Sambartaro. Whidden, a retired advertising man, testified that petitioner came to him with a product called "Ad-Tile" and stated to him:

"It's mine, I designed it." (Tr. 262).

Whidden said that petitioner asked him to help promote "Ad-Tile" to New York advertising agencies and also promised him a stock interest in the product. (Tr. 263, 265). He said that petitioner never told him that anyone else had an interest in "Ad-Tile":

"he never mentioned anybody at all. I assumed from what he said that it was strictly his. . . . he told me that and I assumed that it was correct." (Tr. 266).

Whidden was followed by Sambartaro, another would-be promoter of "Ad-Tile." The prosecutor stated that the purpose of Sambartaro's testimony was

"to show Leo Henzel's double-dealing" and that "he was dealing with Cipra, Sambartaro and Gibson, all at the same time, and not revealing the identity or existence of any of the others to any of them." (Tr. 300).

According to Sambartaro, petitioner said that he owned all of "Ad-Tile" and never mentioned that either Cipra, Gibson, or Point of Impact had any interest in the product. (Tr. 276-77). He said that after giving petitioner money in the belief he would own 50% of "Ad-Tile," he learned in the fall of 1963 that Gibson and Cipra also claimed to be involved in the enterprise. (Tr. 273, 279-282).

Petitioner was absent throughout the testimony, both on direct and cross-examination, of Whidden and Sambartaro. At the end of Sambartaro's testimony, the prosecution rested. (Tr. 303). Petitioner thus missed completely one of the two days of testimony against him.

Trial then recessed until November 4, 1966, almost four months later.[4] Petitioner was then present. Nothing was said as to his absence at the preceding trial session. When trial resumed, a discussion ensued as to whether the defense had made a motion for a directed verdict at the close of the State's case. The

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[4] The lengthy delay was due to the court's schedule, illness of defense counsel, absence of witnesses on certain dates, and other factors. (Supp. Tr. 21, 24, 27-28). Petitioner asserted on appeal that the delays denied him a speedy trial and a fair hearing because of the trial court's later inability to recall the trial testimony. (*E.g.*, Tr. 306, 438, 441-42). Petitioner wishes to preserve his right to argue this question in the event that this Court grants certiorari.

trial court asked the clerk what his records reflected. The clerk replied:

> "Judge, there was an oral motion for a directed verdict after Mr. Cipra testified, and then the case was resumed, and Patricia Shaw, John Gibson, Frank Ware and Mr. Whidden and Mr. Sambartaro testified afterward. Then the State rested and the Defense did not." (Tr. 306).

The defense then moved for a directed verdict. (Tr. 310) In opposing the motion, the prosecutor repeatedly relied on Sambartaro's testimony to show that petitioner was engaged in a pattern of misrepresentation about his ownership of "Ad-Tile" and concealment of the identity of the various persons with whom he dealt. (See, *e.g.*, Tr. 316, 318, 319.) The Court denied the motion and the defense went forward. Tr. 324).

The defense case in essence was that petitioner had never misrepresented his ownership of "Ad-Tile" to Cipra; the moneys he received from Cipra were loans for which petitioner gave promissory notes; he had no intent to defraud; and the case belonged in a civil court, not a criminal. One of petitioner's attorneys, who gave him legal advice on "Ad-Tile," testified that petitioner did not claim to have originated "Ad-Tile" but was only involved in developing it. He further testified that petitioner had stated at the time that Cipra "had advanced him money, and he had given him notes." (Tr. 403, 405). The defense testimony also showed that Cipra, Gibson and Sambartaro, after becoming aware of each other's claims against petitioner, had suggested that he try to work out a settlement with them and had brought a civil action against him in De-

cember, 1963. (Tr. 396-99). Only later was the matter pressed as a criminal prosecution.

Petitioner himself testified at length. He stated that the checks from Cipra were loans, as evidenced by the notes he gave in return; none of this money was intended for promotion of "Ad-Tile" in any event; he made no agreement or promise to give Cipra an interest in "Ad-Tile"; and there were no misrepresentations of fact because he was the originator and owner of a concept of advertising tile which was completely different from the product which Point of Impact claimed to own. (Tr. 466-72, 522-29, 542-44, 557, 566-67).

At the close of the evidence, the trial court denied another motion for a directed verdict and found petitioner guilty on one charge. The court stated:

> "That is the one in which there is no promissory note."
>
> "Of course this whole matter arises obviously, because everybody had some larceny in their hearts. These other two witnesses [of the prosecution] are not Simon Pure. I am well aware of it, but that does not affect the guilt of the defendant in this case." (Tr. 611-12).

Petitioner thereafter appealed to the District Court of Appeal. He asserted, *inter alia,* that his constitutional rights were violated by the trial court's taking of testimony by prosecution witnesses in his absence. (Brief of Appellant in the District Court of Appeal, p. 15).[5] He specifically alleged that the court's action deprived him of his right to confront his accusers and to cross-examine, relying on leading cases in this Court

[5] Copies of the Briefs in the Florida state courts are being lodged with the Clerk of this Court.

and other federal courts under the Sixth Amendment to the Federal Constitution. (*Id.*, pp. 10-15).

Petitioner also filed with the District Court of Appeal his affidavit stating that his absence from the trial on July 11, 1966, was "involuntary and for reasons beyond his control" because of the airline strike. He further swore that: he was not advised by anyone that a trial session would take place on July 11; he did not authorize his trial attorney to waive his presence at the trial; his attorney's purported waiver was without his knowledge, consent or acquiescence; he did not subsequently acquiesce in such waiver; he did not learn there was a trial session on July 11 until December 9, 1966, the day the trial court found him guilty; he did not know Whidden and Sambartaro had testified in his absence; he had in his possession documents which were necessary for the cross-examination of these two witnesses; and as a layman he did not know how to make objection to having testimony taken in his absence. (Affidavit of Leo Henzel, September 30, 1967).[6]

Nevertheless, the District Court of Appeal held that petitioner had not been denied his constitutional right to confront his accusers. It held, alternatively, that (1) petitioner's voluntarily removing himself from Florida to New York during the trial constituted a waiver of his right to be present on July 11, even though he was unable to return because of the strike, and (2) he also waived this right by failing to raise it when trial resumed on November 4 and the court clerk read the list of witnesses who had previously testified,

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[6] A copy of this affidavit, which was before the District Court of Appeal when it rendered its decision , is also being lodged with the Clerk of this Court. It is set forth in full in Appendix C to this petition.

a list which included the names of Whidden and Sambartaro.

REASONS FOR GRANTING THE WRIT

This case presents a novel and important constitutional question, never before decided by this Court: whether a defendant in a felony prosecution in a state court has the same right under the Fourteenth Amendment that a federal criminal defendant has under the Confrontation Clause of the Sixth Amendment—to be present at all stages of his trial unless he knowingly and intentionally waives the right.

The Court in *Snyder* v. *Massachusetts,* 291 U.S. 97, 105-06 (1934), assumed, without deciding, that:

> "... in a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge. Thus, the privilege to confront one's accusers and cross-examine them face to face is assured to a defendant by the Sixth Amendment in prosecutions in the federal courts ... For present purposes we assume that the privilege is reinforced by the Fourteenth Amendment, though this has not been squarely held."[7]

[7] The Court then went on to hold, 5 to 4, that the trial court's refusal to permit the defendant to accompany the jury on a view of the scene of the crime was not a denial of due process; the Court reasoned that the defendant was not deprived of "fundamental justice" because a view is not part of the trial. *Id.* at 108, 113. The Court relied heavily for its holding on the interpretation of the Due Process Clause of the Fourteenth Amendment set forth in *Twining* v. *New Jersey,* 211 U.S. 78 (1908), and *Hurtado* v. *California,* 110 U.S. 516 (1884). The *Snyder* reading of the relationship between the Bill of Rights and the Fourteenth Amendment has been outmoded by the many decisions of this Court applying specific provisions of the Bill of Rights to the States.

We submit that the time has now come for this Court to decide this question and that this case presents an appropriate occasion to do so.

All the foundations for such a decision were laid down by this Court in *Pointer* v. *Texas,* 380 U.S. 400 (1965), and *Douglas* v. *Alabama,* 380 U.S. 415 (1965). This Court held that "the Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment." *Pointer* v. *Texas, supra,* 380 U.S. at 403. This Court further held in *Pointer* that "the right of an accused to be confronted with the witnesses against him must be determined by the same standards whether the right is denied in a federal or state proceeding." *Id.* at 404-08.

In *Douglas* v. *Alabama, supra,* this Court established that the question of waiver of the constitutional right of confrontation must also be determined by federal standards. 380 U.S. at 422. This point was made even more explicit the following Term in *Brookhart* v. *Janis,* 384 U.S. 1, 4 (1966), when this Court held:

> "The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constitutional rights [citation omitted] . . . . and *for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.'* [citing *Johnson* v. *Zerbst,* 304 U.S. 458, 464 (1938)]." (Emphasis supplied)[8]

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[8] See also *Fay* v. *Noia,* 372 U.S. 391, 439 (1963).

Pointer, Douglas, and *Brookhart* all dealt with the cross-examination aspect of the constitutional right of confrontation. The present case involves another aspect of the Confrontation Clause: the right of a criminal defendant in a felony case to be present at all stages of his trial.

This right is as fundamental a part of the Confrontation Clause as the right to cross-examine. Indeed, the right of personal presence is indispensable to the implementation of the right of cross-examination, as well as the guaranty of the effective assistance of counsel. This Court said in *Diaz* v. *United States,* 223 U.S. 442, 455 (1912):

> "In cases of felony our courts, with substantial accord, have regarded [the right of personal presence] as extending to every stage of the trial, inclusive of the empaneling of the jury and the reception of the verdict, and *as being scarcely less important to the accused than the right of trial itself.*" (Emphasis supplied)

Nineteenth Century cases in this Court held the right of personal presence so important that it could not be waived by the defendant. Thus this Court said, *per* Mr. Justice Harlan, in *Hopt* v. *Utah,* 110 U.S. 574, 579 (1884):

> "We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial.[9] . . . That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed

[9] Like Florida, see Fla. Stat. Ann. § 914.01, the Territory of Utah had a statute requiring the personal appearance of the defendant in a felony case.

> with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. . . . If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

This view was reiterated in *Lewis* v. *United States,* 146 U.S. 370, 372 (1892):

> "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner. While this rule has, at times and in the cases of misdemeanors, been somewhat relaxed, yet in felonies, it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial."

In this century, this Court relaxed the absolute rule that personal presence in a felony case could not be waived under any circumstances. But it is clear that the waiver doctrine is narrowly circumscribed and that trial courts have a duty to guard against unknowing or unintentional waivers. Thus, in *Diaz* v. *United States, supra,* this Court held that a felony trial in the Philippines, conducted under the Philippine Civil Government Act, could proceed in the absence of a defendant who was on bail and who "voluntarily absented himself *and sent to the court a message expressly consenting that the trial proceed in his absence, which was done.*" 223 U.S. at 453. (emphasis supplied.)[10]

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[10] Federal Rule of Criminal Procedure 43, provides that:

"The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the

Under federal standards governing the right of personal presence and the permissible scope for waiver of the right, petitioner's federal constitutional right to confrontation was violated in the present case.

He was unavoidably absent from his trial throughout one of the two days of testimony against him. During that time, the prosecution presented two key witnesses. The testimony of Whidden and Sambartaro was not merely cumulative or embellishing, but went to the heart of the case. The prosecution relied heavily on this testimony to show a pattern of fraud, concealment, and "double dealing" by petitioner. Without this testimony, the case was largely reduced to Cipra's word against petitioner's—and Cipra's testimony was seriously impeached by his acknowledgment of receiving demand, interest-bearing promissory notes from petitioner in return for all the checks he gave petitioner except one. This led the trial court to acquit petitioner on all the charges except that based on the one check for which no promissory note was produced at trial.

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return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict."

Rule 43 is a restatement of existing law as set forth in the *Lewis* and *Diaz* cases. Notes of the Advisory Committee on the Federal Rules of Criminal Procedure to Rule 43.

The prejudice to petitioner is thus exceptionally clear on the record.[11] Moreover, his counsel, in agreeing to proceed in his absence, stated that he did not have the documents necessary for cross-examination of Sambartaro. (Tr. 259). According to petitioner's affidavit filed in the court below, petitioner had documents to cross-examine this witness in his possession in New York where he was stranded by the airline strike.

Far less compelling circumstances than these have been held to constitute denial of the right of confrontation in the federal courts. In *United States* v. *Hamrick*, 293 F.2d 468 (4th Cir. 1961), at a non-jury trial for interstate transportation of stolen property in excess of $5,000 value, a witness testified to the value of the

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[11] We note in passing that a showing of prejudice to the defendant is probably unnecessary when the constitutional right of confrontation is denied. This Court commented in *Snyder* v. *Massachuetts, supra,* with respect to the Sixth Amendment right of confrontation:

> "constitutional privileges or immunities may be conferred so explicitly as to leave no room for an inquiry whether prejudice to a defendant has been wrought through their denal." 291 U.S. at 116.

See *United States* v. *Crutcher,* 4 Crim. L. Rep. 2002 (2d Cir. 1968); *Fina* v. *United States,* 46 F.2d 643, 644 (10th Cir. 1931).

Even if there is room for the "harmless error" doctrine as applied to the denial of a procedural right essential to the fairness of the fact-finding process at trial, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman* v. *California,* 386 U.S. 18, 24, (1967). No one can read the record in this case and conclude that denial of petitioner's right of confrontation was harmless beyond a reasonable doubt.

goods outside the defendant's presence. The Court said:

> "No authority need be cited in support of our conclusion that the admission of testimony in the absence of the defendant was a direct violation of his right to be confronted with the witnesses against him as guaranteed by the Sixth Amendment to the Constitution of the United States, and a violation of Rule 43 of the Federal Rules of Criminal Procedure." 293 F.2d at 470.

See also *Greenberg* v. *United States,* 280 F.2d 472, 475-76 (1st Cir. 1960); *Cross* v. *United States,* 325 F.2d 629 (D.C. Cir. 1963); *Evans* v. *United States,* 284 F.2d 393 (6th Cir. 1960).

The holding of the court below that petitioner waived his constitutional right of confrontation is demonstrably erroneous under federal standards for waiver of this right. None of the circumstances in this record supports a conclusion of "an intentional relinquishment or abandonment of a known right or privilege" by petitioner. *Johnson* v. *Zerbst, supra,* 304 U.S. at 464.

The attempt of petitioner's counsel to waive his right to be present was ineffective. In *Brookhart* v. *Janis, supra,* the defendant's lawyer agreed to a so-called "prima facie" trial under Ohio practice, in which the state would make out a prima facie case of guilt and the defense would not cross-examine. This Court held this purported waiver ineffective, stating:

> "it seems clear that petitioner's counsel agreed to a prima facie trial. By agreeing to this truncated kind of trial—if trial it could be called—we can assume that the lawyer knowingly agreed that the State need make only a prima facie show-

> ing of guilt and that he would neither offer evidence on petitioner's behalf nor cross-examine any of the State's witnesses. The record shows, however, that petitioner himself did not intelligently and knowingly agree to be tried in a proceeding which was the equivalent of a guilty plea and in which he would not have the right to be confronted with and cross-examine the witnesses against him. . . . We hold that the constitutional rights of a defendant cannot be waived by his counsel under such circumstances." 384 U.S. at 6-7.

The Court of Appeals for the Second Circuit recently reached a similar result in a case in which the defendant was absent at the impaneling of his jury and his lawyer agreed to proceed in his absence. *United States* v. *Crutcher,* 4 Crim. L. Rep. 2002, decided September 12, 1968. The Court said:

> "It is an elementary principle of due process that [a criminal defendant] must be allowed to be present at his own trial. . . . [Defendant's attorney] would not have had the ability to bind [defendant] to a decision of this type without obtaining [defendant's] consent." *Id.*

See also *Greenberg* v. *United States, supra; Evans* v. *United States, supra.*

As the Court of Appeals for the District of Columbia Circuit has stated:

> "A concession or stipulation by counsel cannot substitute for an informed waiver by the defendant of his right to be present." *Cross* v. *United States, supra,* 325 F.2d at 632 n. 8.

The purported waiver by counsel is expressly negated in this case by petitioner's affidavit in the court below

that he did not authorize his attorney to waive his presence and that his counsel's action was without his knowledge, consent, or acquiescence.

The other factors relied on by the court below are plainly insufficient to constitute a valid waiver. The fact that petitioner left Florida for New York City after the conclusion of proceedings on July 6 and was then stranded in New York by the airline strike on July 11 could not possibly be considered a voluntary decision to forgo his right of presence at trial. The court below said: "His inability to return does not alter the fact that he left voluntarily." (Appendix A, 3a) But leaving Florida for New York was obviously not an intentional relinquishment of petitioner's right. As the record shows, petitioner had personal and business interests in New York City. He was free on bail. He was not fleeing the jurisdiction by going to New York City and he returned for all subsequent segments of the trial. The trial court employed the unusual procedure in this case of taking the testimony in segments —on July 6, July 11, November 4, and December 9. Petitioner surely had no duty to remain on the spot at all times or else lose his right to be present at his own trial.[12] His affidavit in the court below confirms that his absence was involuntary and that he did not even know there would be a trial session on July 11.

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[12] In *Smith* v. *United States*, 357 F.2d 486, 490 (5th Cir. 1966), the Fifth Circuit upheld the decision of a trial court not to proceed with a trial in the absence of a defendant. The Court said:

> "the right to be present at one's own trial is one which we should carefully safeguard . . ." *Id.* at 490.

There was no necessity for the trial court in the present case to take the testimony of key prosecution witnesses in the absence of petitioner.

The reliance of the court below on petitioner's failure to object, upon his return to the trial, to the taking of testimony in his absence will not withstand scrutiny. The trial court itself recognized when petitioner's trial counsel made his purported waiver on July 11 that it would be necessary to secure petitioner's affirmance of his attorney's action on the record. It specifically referred to the problem of waiver which had arisen in another case. The trial court said:

> "let us make sure that when he comes back, for the record, that he affirms that . . . . I want you to remember that when he gets back that you are to get him to reaffirm that." (Tr. 259).

Trial did not resume until November 4, and there was never any effort to secure an affirmance from petitioner of his attorney's action. The court did nothing to protect petitioner's rights. There is not the slightest indication in the record that petitioner ever knew that he had a right to be present at his trial on July 11, which he would be waiving by his failure to object at a later time. Indeed, petitioner's affidavit in the court below states that he did not even know that trial had taken place on July 11 until he was convicted on December 9, that he never intended to acquiesce in what his attorney had done, and that he did not know how to object to testimony taken in his absence.

His failure to object, under these circumstances, would not constitute a valid waiver of the right to be present in a federal court, where waiver means an *intentional* relinquishment of a *known* right. In *Cross* v. *United States, supra,* the Court stated:

> "On the subject of waiver, 'It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional

> rights and that we 'do not presume acquiescence in the loss of fundamental rights.' . . . *This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.'* [citations omitted]. This means that where the defendant is available, *'the serious and weighty responsibility' of determining whether he wants to waive a constitutional right requires that he be brought before the court, advised of that right, and then permitted to make 'an intelligent and competent waiver.'* This has been the uniform practice. . . . At least an on-the-record statement in open court by the defendant himself should be required." 325 F.2d at 631, 633 (emphasis supplied)

The recital in court on November 4 of a list of witnesses who had testified at the previous sessions of July 6 and July 11 could not remotely constitute notice to petitioner that he had a constitutional right to confront the witnesses against him and that he would waive it if he did not immediately object. The court clerk read the names in a wholly unrelated context, in response to the trial court's inquiry whether the records reflected a directed verdict motion by the defense.[13] Neither the inquiry nor the response were even directed to the petitioner. Neither explicitly nor implicitly did they advise him that his silence would be held to be a waiver of a constitutional right.

It is elementary law in this Court that before a waiver of a fundamental constitutional right will be found, the defendant must be specifically advised that he has the right and given an opportunity to decide whether he

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[13] According to petitioner's affidavit in the court below, he was not even aware that the names of Whidden and Sambartaro were on the list.

will waive it. See, *e.g.*, *In re Gault*, 387 U.S. 1, 42 (1967); *Evans* v. *United States*, *supra*, 284 F.2d at 395. This record establishes beyond doubt that petitioner was never so advised and that he did not waive his constitutional right to confront his accusers.[14] He faces five years in the penitentiary on a conviction obtained in violation of one of the most basic of all procedural rights—a right this Court has said is "scarcely less important to the accused than the right of trial itself." *Diaz* v. *United States*, *supra*, 223 U.S. at 455.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

ROBERT M. HERZSTEIN
DANIEL A. REZNECK
ARNOLD & PORTER
1229 19th Street, N. W.
Washington, D. C. 20036

Attorneys for Petitioner

Of Counsel:

FINK & SYNA
M-113 Biscayne Building
19 West Flagler Street
Miami, Florida 33130

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[14] Although we submit that the record is clear that there was no waiver, if there should be any question as to its completeness on this point, this Court should grant certiorari, vacate the judgment below, and remand the case to the court below for an evidentiary hearing on whether petitioner "understandingly and knowingly" relinquished his federal constitutional right. See *Henry* v. *Mississippi*, 379 U.S. 443, 450-52 (1965). This procedure may obviate the necessity for resort to federal collateral review of the state criminal proceedings. *Id.* at 452-53.